BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JON D. KEIL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,026,400
BROWN'S TREE SERVICE	)	
Respondent	)	
AND	)	
	)	
KANSAS BUILDING INDUSTRY	)	
WORKERS COMPENSATION FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the February 1, 2006, Order for Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

This is a claim for an October 6, 2005, accident in which claimant sustained severe burns. In the February 1, 2006, Order for Compensation, the Judge granted claimant's request for workers compensation benefits.

Respondent and its insurance fund contend Judge Avery erred. They argue claimant's accident did not arise out of and in the course of his employment. Moreover, they argue claimant should be barred from receiving workers compensation benefits as he was allegedly intoxicated at the time of the accident and his intoxication contributed to his accident. Accordingly, respondent and its insurance fund request the Board to reverse the February 1, 2006, Order.

Conversely, claimant contends the Order for Compensation should be affirmed. He argues his accident arose out of and in the course of his employment with respondent as his accident occurred while he was procuring gasoline for a generator respondent's employees were using at their campsite. He also argues the evidence fails to establish he was intoxicated at the time of the accident and his alcohol consumption contributed to the accident.

The only issues before the Board on this appeal are:

1. Did claimant's accident arise out of and in the course of his employment with respondent?

2. If so, did respondent and its insurance fund establish claimant was intoxicated at the time of the accident and that such condition contributed to his accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the file compiled to date and considering the parties' arguments, the Board finds and concludes the Order for Compensation should be affirmed.

In either late August or early September 2005, respondent sent a work crew to New Orleans, Louisiana, to trim trees following hurricane Katrina. Most of the work crew stayed in a camper, which respondent had obtained and which they set up in a mall parking lot. And three of the crew stayed in a tent. They also brought a gas-powered generator, which provided the camper with electricity.

After several weeks in Louisiana, they ran out of work. On October 6, 2005, respondent's president and manager, Troy Brown, announced they would be returning home the next day. The crew stopped working early that day, cleaned up and headed for Bourbon Street, where they visited for approximately five hours.

Claimant testified he drank two beers that evening. But Mr. Brown, who testified he was with claimant approximately two of the five hours they were on Bourbon Street, contends claimant consumed more than that, plus he had at least two mixed drinks, which were believed to be Long Island Iced Teas. On the other hand, Mr. Brown easily drank at least 10 to 12 beers himself.[1] According to Mr. Brown, except for their designated driver, the entire crew was intoxicated.

The crew arrived at their campsite around 11 p.m. Shortly afterwards, claimant removed a plug and drained gasoline, which he intended to use for the generator, from one of respondent's trucks. The record does not provide many details, but somehow gasoline got on claimant's clothing, which then ignited when someone nearby lit a cigarette.

Claimant, who sustained burns on his hands, arms, legs and chest, was taken by ambulance to a nearby hospital. Claimant was told he sustained burns over 52 percent of his body.

[1] P.H. Trans. at 47.

Respondent and its insurance fund contend claimant's accident did not arise out of and in the course of his employment with respondent. The Board disagrees.

Maintaining the generator was part of the crew's duties at its campsite. Accordingly, obtaining gasoline for the generator was an incident of claimant's employment with respondent. The Board concludes claimant's accident arose out of and in the course of his employment with respondent. The accident arose out of the employment as maintaining the generator and handling gasoline created a risk associated with his employment with respondent. And the accident occurred in the course of claimant's employment as the accident occurred while claimant was performing an activity that was part of his job.

Respondent and its insurance fund also contend claimant should be barred from receiving compensation as he was allegedly intoxicated at the time of the accident. The Workers Compensation Act provides that an employer shall not be liable when a worker's injury is contributed to by the use of alcohol or drugs.[2] But at this stage of the proceeding, there is insufficient evidence to establish that claimant's alcohol consumption contributed to the accident.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.[3]

WHEREFORE, the Board affirms the February 1, 2006, Order for Compensation entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of April, 2006.

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Roy T. Artman, Attorney for Respondent and its Insurance Fund
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[2] K.S.A. 2005 Supp. 44-501(d)(2).

[3] K.S.A. 44-534a(a)(2).